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In the Supreme Court of the United States

OCTOBER TERM, [redacted]

1954

PHILIP BART, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals is reported at 203 F. 2d 45. The opinions of the District Court denying petitioner's motion to dismiss the indictment are reported at 95 F. Supp. 1010, 1012.

JURISDICTION

The judgment of the Court of Appeals was entered December 19, 1952. A petition for rehear-

ing was denied on April 15, 1953. On May 15, 1953, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 25, 1953, and a petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the finding of the trial court that petitioner was apprised of the fact that the grounds asserted by him as a basis for refusal to answer certain questions put to him, by a subcommittee of the House Committee on Un-American Activities, had been rejected by the subcommittee, and that he was expected to answer the questions.

2. Whether a sufficient showing was made to entitle petitioner to a dismissal of the indictment, or to a hearing to investigate the qualifications of the grand jurors, when it was shown that ten of the members of the grand jury were government employees and that two more were wives of government employees, and various data were offered purporting to show that government employees at the time of the indictment could not have been impartial with respect to a person alleged to be a Communist.

3. Whether, under the First Amendment, a congressional committee, duly authorized to investigate "subversive and un-American propaganda" and "all other questions in relation thereto that

would aid Congress in any necessary remedial legislation", can question the general manager of the Daily Worker as to his name before it was changed, and as to the names of certain Communist Party organizers in Ohio, after he had admitted that he had himself been an organizer there.

STATUTES INVOLVED

The relevant statutes, resolutions, and rules are set out in the Brief for the United States in Opposition in *Emspak* v. *United States*, No. 796, O. T. 1952.

STATEMENT

On November 20, 1950, the petitioner, Philip Bart, was indicted by a grand jury for the United States District Court for the District of Columbia for having wilfully refused to answer 32 questions before a duly created subcommittee of the Committee on Un-American Activities of the House of Representatives, in violation of the provisions of 2 U.S.C. 192 (R. 108-113).

On the trial of the case the following was stipulated or shown:[1]

The Committee on Un-American Activities was authorized, both by statute and House Resolution to make, from time to time—

> * * * as a whole or by subcommittee * * * investigations of (i) the extent, character, and objects of un-American propaganda activities

[1] Petitioner moved to dismiss the indictment on the same grounds alleged by the defendant Emspak in No. 796, which are summarized in the government's brief in opposition in that case.

> in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

60 Stat. 828; H. Res. 5, 79th Cong., 1st sess.

Acting pursuant to this authorization, and apparently in order to get a fuller picture of the activities of persons associated in various ways with Communist Party activities (see R. 31-32, 103-104), the Committee in June 1950 called the petitioner, who was general manager both of Freedom of the Press Co., Inc., an organization which publishes the Daily Worker, and of the Daily Worker itself (R. 15).

Petitioner was asked a number of questions some of which he answered (R. 7-26). He refused, however, to answer some thirty-two questions, which were made the basis for his indictment. During or at the close of his trial, all except eight of the counts were dismissed (R. 28, 62); and, on appeal, conviction was sustained only as to five which are the only ones involved in the present petition.

Four of the questions related to the fact that petitioner had changed his name, and were an attempt to discover what his original name was. They were (R. 109):

> Count 3. What was the name of the defendant when he came to the United States.

> Count 4. What was the defendant's father's name.
>
> Count 5. Under what name did the defendant's father become a citizen of the United States.
>
> Count 6. What did defendant change his name from.

The fifth question relates to petitioner's activity in the Communist Party, and was asked after the petitioner had admitted that he was a section organizer for the Communist Party in Ohio in 1936 (R. 16). It was, as stated in Count 8 (R. 109):

> Count 8. Who were the other officials of the Ohio section of the Communist Party during the period when the defendant was organizer there.

The record shows that petitioner never answered any of these questions. His refusal to the last question (Count 8) was based on a claim of possible incrimination "in accordance with Article V of the Constitution * * *" (R. 16). The colloquy, on this question, was as follows (R. 16-17):

> "Mr. Tavenner: Who were the other officials of the Ohio section of the Communist Party during the period of time you were organizer there?
>
> "Mr. Bart: I object to this question. I will not answer it, standing on my rights in accordance with Article V of the Constitution, and furthermore I protest because this committee has asked this question of numerous people

and has infringed upon their rights as American citizens.

"Mr. Tavenner: I think, Mr. Bart, I should point out that your testimony relating to other people who were associated with you at that time could not in any way incriminate you under the Fifth Amendment.

"Mr. Unger: I should like to correct you, Mr. Tavenner.

"Mr. Walter: You advise your client.

"Mr. Tavenner: You have told us you were a section organizer for the Communist Party in Ohio, and my question now is, who were the officials who worked with you in that work, that is, officials of the Ohio section of the Communist Party?

"Mr. Unger: Permit me to advise my client that Mr. Tavenner, counsel, is in error in his interpretation of the Constitution so far as the Fifth Amendment is concerned, and that Mr. Bart, the witness, is entirely correct in his interpretation of the Constitution, and has a right to assert that this committee has no right—no right, let me make it plain—

* * * * *

"Mr. Unger: As he has stated in his previous answer, he is not required to testify against himself.

"Mr. Bart: I stand on the advice of my counsel. I am not required to testify against myself, and in accordance with Article V of the Constitution I will not answer the question.

"Mr. Tavenner: I was not asking you to

testify against yourself. I was asking you to state the names of other persons associated with you.

"Mr. Bart: I consider this an attempt on the part of the committee to use this against myself as well as against others, as it has on many previous occasions.

"Mr. Walter: And therefore you refuse to answer?

"Mr. Bart: I refuse to answer."

With respect to the questions made the basis of counts 3, 4, 5 and 6, on the other hand, petitioner's challenge was not based on the danger of incrimination, but, rather, on the impropriety of the Committee in asking the questions. These questions were asked after the Committee had first asked whether petitioner had been born under the name, Philip Bart, and had been told by petitioner that he could not see what that had to do with the inquiry; and after he had also been asked when he took the name, Bart, and he had stated that "I don't care to discuss it," and that "I will not answer it because it is not pertinent to the hearing" (R. 8-9). The remainder of the relevant colloquy follows (R. 9, 10-12):

Mr. Case: What was your name at the time you came to the United States? [Count 3]

Mr. Bart: I have already answered this question.[2]

* * * * *

[2] This could have referred only to a previous statement that petitioner refused to answer the questions relating to his name because they were not pertinent (R. 9).

Mr. Tavenner: You are a naturalized American citizen?

Mr. Bart: Yes.

Mr. Tavenner: How did you become naturalized?

Mr. Bart: Through process of my father.

Mr. Tavenner: What was your father's name? [Count 4]

Mr. Bart: I have already dealt with this question.

Mr. Tavenner: When was your father naturalized?

Mr. Bart: I do not remember.

Mr. Unger: Just a minute.

(Witness confers with his counsel.)

Mr. Bart: About 30 years ago.

Mr. Tavenner: Do you refuse to tell the committee your father's name?

Mr. Unger: Mr. Tavenner, he doesn't refuse to tell the committee. He is trying to tell the committee that this line of inquiry is a highly improper one.

* * * * *

Mr. Bart, you claim citizenship by virtue of your father's citizenship; is that right?

Mr. Bart: That is right.

Mr. Walter: Under what name did your father become a citizen of the United States? [Count 5]

Mr. Bart: Under his own name.

Mr. Walter: What was that name?

Mr. Bart: I have already stated my reply to this question as far as I am concerned.

Mr. Walter: How can you claim citizenship by virtue of your father's citizenship if you don't know what name your father used when he became a citizen?

Mr. Unger: Mr. Chairman—

Mr. Walter: Let the witness answer the question. You may advise your client.

Mr. Bart: I have answered I am a citizen by virtue of that fact, and that this is my legal name by which I vote and am registered and am known.

Mr. Walter: When did you legally change your name?

Mr. Bart: Many years ago.

Mr. Walter: Where?

Mr. Bart: In the city of New York.

Mr. Walter: Did you have your name changed in court?

Mr. Bart: Yes; about 15 years ago.

Mr. Unger: His answer is about 15 years ago.

Mr.Walter: I understand. What name did you change your name from? [Count 6]

Mr. Bart: I have already stated my reply to this question.

Mr. Harrison: I understand you refuse to answer the chairman's question?

Mr. Bart: My answer is that I have answered what my name is here, which is the only question pertaining to the inquiry, it seems to me.

Mr. Walter: Of course all of this is a matter of public record?

Mr. Bart: Correct.

Mr. Walter: And then I suppose you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences.

Mr. Unger: I think, again, Mr. Chairman, Mr. Bart has indicated very plainly he has not been contumacious in any regard. He states his name has been Philip Bart for a large number of years.

Mr. Walter: Don't argue with the committee. You advise your client as you see fit.

Mr. Case: Mr. Chairman, it seems to me the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and as proper as your question as to what his name was before it was changed.

Mr. Walter: No. He has counsel. Counsel knows that is the law. Proceed, Mr. Tavenner.

A report of the Committee was thereafter submitted to the House of Representatives recommending the citation of petitioner for contempt, and this report was, in course, approved by the House and certified by the Speaker to the United States Attorney for the District of Columbia for appropriate action (R. 180).

At the conclusion of the trial, the court, sitting without a jury, found petitioner guilty (R. 106), specifically stating that (R. 105):

> The defendant clearly understood the questions in the first six counts of the indictment,

> and that he was being asked to answer them. He indicated that he did not consider the information sought as within the scope of the business of the committee. He comprehended that he was refusing to answer those questions.[3]

Petitioner was thereupon sentenced to imprisonment for a period of three months and to pay a fine of $500.00 (R. 183-184).

On appeal, the judgment was affirmed, with one judge dissenting.[4] With respect to the issues presented by the petition for certiorari, the court held (1) by reference to the *Emspak* case, decided concurrently, that it had not been shown that the grand jury was invalid, and that insufficient data had been presented to require a hearing on that issue; and (2) that there was sufficient evidence to support the finding of the trial court that the petitioner was required to answer the questions now in issue and that he was deliberately and intentionally refusing to do so. The petitioner's present First Amendment contention was not passed upon by the court below.

ARGUMENT

1. Although the petitioner suggests in his statement of Questions Presented that one must be specifically directed to answer questions before he can be held for contempt (Pet. 7), he concedes in his argument that this is not necessary, and that the

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[3] The court also stated that petitioner "refused to answer" the question made the basis of Count 8 (R. 105).

[4] Unlike the *Emspak* and *Quinn* cases (Nos. 796 and 795, O.T. 1952), this case was not heard en banc.

court below was right in holding that the only question, in this aspect of the case, is whether the witness clearly understood that his objections were not being accepted and that he was being required to answer (Pet. 12). The court below was clearly correct in concluding that the finding of the District Court that petitioner understood that he was being required to answer, but deliberately refused to do so, was fully supported by the evidence.

With respect to Count 8, the colloquy which we have set out above shows clearly that, after petitioner's counsel repeatedly expressed the view that petitioner was privileged to refuse to answer, the Committee was still of the view that the question had to be answered; and that, petitioner, knowing this, stated "I will not answer the question", and again, after being asked "And you therefore refuse to answer?", stated, "I refuse to answer" (R. 17). As conviction on any count will suffice to sustain the judgment, this unequivocal refusal suffices to dispose of the case on this issue.[5]

It is also clear that petitioner understood that answers were being sought to the questions involved in Counts 3 to 6, and that the Committee was not in any accepting his objections to its queries. For one thing, the fact that the Committee sought in different ways to get at the same fact, a disclosure by the petitioner of his original name, shows

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[5] Petitioner seems to have abandoned his contention that he had not waived the privilege against self-incrimination with respect to this question, a contention which the court below rejected. Cf. *Rogers* v. *United States*, 340 U.S. 367.

that the Committee was not abandoning its point. In addition, after petitioner had refused to answer these four questions, the Chairman of the subcommittee said:

> And then I suppose you know that under the law a question innocent on its face can't be arbitrarily ignored. You can't refuse to answer such a question without running the risk of the consequences. [R. 12.]

At the same time, another member of the subcommittee stated:

> * * * it seems to me the witness should be advised of the possibilities of contempt when he fails to answer a question as simple and proper as * * * what his name was before it was changed. [R. 12.]

In this connection, the Chairman pointed out that this was not necessary, as petitioner's counsel knew what the law was. As the Court of Appeals pointed out, those statements were sufficient to meet applicable legal standards and to justify the finding that the refusal to answer was deliberate and intentional, and thus to support the general verdict of guilty.

2. The arguments based on the alleged infringement of the First Amendment and the alleged disqualification of government employees as grand jurors are discussed in the Government's brief in *Emspak* v. *United States*, No. 796, 1952 Term, to which the Court is respectfully referred.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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